

**DRAFT**

**PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**  
**Item # 40 I. D.# 2834**  
**ENERGY DIVISION**  
**RESOLUTION E-3853**  
**OCTOBER 16, 2003**

**R E S O L U T I O N**

Resolution E-3853. Pacific Gas and Electric Company requests approval of renewable resource procurement contracts.

By Advice Letter 2423-E filed on September 18, 2003.

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**SUMMARY**

Pacific Gas and Electric Company (PG&E) filed Advice Letter (AL) 2423-E on September 18, 2003, requesting Commission review and approval of several renewable energy contracts. AL 2423-E was submitted in compliance with the "Assigned Commissioner's Ruling Specifying Criteria for Interim Renewable Energy Solicitations" (ACR) dated August 13, 2003. The ACR authorized any of the investor-owned utilities (IOU) to enter into renewable energy contracts in the interim period prior to the first solicitation pursuant to the fully developed Renewables Portfolio Standard (RPS) adopted in D.03-06-071. The ACR authorized both competitive solicitations and bilateral agreements for renewable energy products. The contracts, for which PG&E is seeking approval, are bilateral agreements between PG&E and the selling parties.

PG&E demonstrated in its filing that the contracts were mutually agreeable to the countersigning parties and that the evaluation methodology used to select the power procurement contracts was reasonable. PG&E also made a sufficient showing that these contracts are in the ratepayers' interest because they meet PG&E's obligation to procure renewable resources at reasonable prices and contain features that protect ratepayers against undue future costs. The members of PG&E's Procurement Review Group (PRG) either supported or did not oppose the approval of these contracts.

We have considered whether, and to what degree, to disclose information submitted to us under seal. It is incumbent upon this Commission to keep sensitive information confidential while still making plain to the public at large the bases for Commission decisions. In the final analysis, it is the Commission's

responsibility to make decisions in the light of day, and we give that obligation great weight in determining whether commercial information is of such critical sensitivity as to override broader public concerns. A similar issue was addressed in Commission Resolution E-3816, and we draw on the treatment of confidential information in that resolution in making our decision regarding the contracts before us.

This resolution finds that certain material filed under seal pursuant to Public Utilities (Pub. Util.) Code Section 583 and General Order (G.O.) 66-C, and considered for possible disclosure, should be disclosed for the reasons discussed in the body of this resolution. Accordingly, text in this resolution which is marked "[REDACTED]" in the redacted copy, which contains the redacted information to be disclosed inside the brackets in the unredacted version, should be made public upon Commission approval of this resolution. Specific pricing information which appears **[[underlined in triple brackets]]**, which appears in this **light blue highlight** in the unredacted electronic copy, which appears in **gray highlight** in the unredacted hardcopy, should *not* be made public under any circumstances. Additionally, any terms of the Power Purchase Agreements (PPAs) and confidential information not submitted under Section 583 (i.e. TURN protest and replies of the Facilities) should not be revealed. Such information is also **highlighted in blue** or **gray** to denote its redacted nature. We wish to make clear that the decision we make here is based on the unique facts before us today, and we will adopt broadly applicable standards governing confidentiality elsewhere. We find that the public interest in non-price disclosure is not outweighed by the public interest in confidentiality.

In its filing, PG&E requests that AL 2423-E be effective no later than October 28, 2003, should its September 18 Motion be rejected<sup>1</sup>.

AL 2423-E was protested by TURN. This resolution approves AL 2423-E effective today.

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<sup>1</sup> "Motion for Adoption of Expedited Review Process for Advice Letter 2423-E," discussed in section titled "Protests"

## **BACKGROUND**

SB 1078, chaptered on September 12, 2002<sup>2</sup>, establishes the California Renewables Portfolio Standard Program, which requires an electrical corporation to increase its use of eligible renewable energy resources<sup>3</sup> to 20 percent of total retail sales no later than December 31, 2017<sup>4</sup>. The Energy Action Plan, a joint agency document approved in May 2003, states a policy preference for accelerating this goal to 2010.

In D. 03-06-071, issued on June 19, 2003, the Commission implemented four key aspects of the statute, establishing:

1. a market price referent for renewables contracts;
2. a process for ranking renewables contracts according to the “least cost” and “best fit”;
3. rules for flexible compliance;
4. standard contract terms and conditions.

That decision also established the review and approval process to be used by the utility, including use of Advice Letter filings.

The statute requires the Commission to direct each electrical corporation to file renewable energy procurement plans to satisfy its obligations under the RPS. The filing of these plans will trigger a competitive renewables solicitation to implement the procurement plan.

The August 13 ACR authorized any of the investor-owned utilities to enter into renewable energy contracts in the interim period prior to the first solicitation pursuant to the fully developed RPS. The ACR authorized both competitive solicitations and bilateral agreements for renewable energy products.

The ACR establishes requirements for any interim procurement activity:

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<sup>2</sup> Statutes of 2002, Chapter 516

<sup>3</sup> Defined in Public Utilities Code Section 399.12(a)

<sup>4</sup> Pub. Util. Code Sec. 399.15(b)(1)

1. Contracts must not anticipate the use of any Supplement Energy Payments to be awarded by the CEC pursuant to Public Utilities Code Sec. 383.5(d).
2. Solicitations must not anticipate creation of a Market Price Referent. Any internal benchmarks developed by the utility must be provided to its PRG during Preliminary Evaluation.
3. An RFO must clearly stipulate up-front how the utility will calculate adders for transmission upgrades and integration costs, and how the utility will assign capacity values and payments to as-available resources.
4. Sellers who anticipate use of the federal Production Tax Credit (PTC), must provide two contract prices, whether the contract is selected under a competitive solicitation or bilateral agreement. One price will assume the PTC is extended in 2004, the other will assume PTC is not extended.

The ACR directs a utility utilizing this interim process to provide its preferred contracts to its PRG and the Commission for review, and provides ten working days each for the PRG to evaluate the Preliminary Evaluation and the Short List of proposed contracts. D.03-06-071 states that “PRG members will have an opportunity to make recommendations on the Advice Letter for Commission consideration.” (Decision at p. 38) Following PRG review, the utility must file by advice letter its proposed contract(s), documentation supporting procurement process steps and evaluation methodology.

In D.02-08-071, the Commission required each utility to establish a PRG whose members, subject to an appropriate non-disclosure agreement, would have the right to consult with the utilities and review the details of each utility’s:

1. Overall transitional procurement needs and strategy;
2. Proposed procurement processes including, but not limited to, the requests for offers (RFOs); and
3. Proposed procurement contracts before any of the contracts are submitted to the Commission for expedited review and approval.

The PRG remains active in reviewing and commenting on IOU solicitations for power products, including renewable energy. PG&E’s PRG participated in discussions of the contracts proposed in AL 2423-E. The PRG for PG&E is comprised of Aglet Consumer Alliance, California Energy Commission (CEC), California Utility Employees (CUE), Consumers Union (CU), Department of Water Resources (DWR), Energy Division, Office of Ratepayer Advocates (ORA),

Natural Resources Defense Council (NRDC), and The Utility Reform Network (TURN).

In July 2003, PG&E began negotiations with **[REDACTED]** power plants. PG&E kept its PRG apprised of the negotiations. On September 18, 2003, PG&E filed Advice Letter 2423-E, requesting Commission approval of the renewable energy contracts. The confirmation of these contracts is subject to Commission approval.

### **NOTICE**

Notice of Advice Letter 2423-E was made by publication in the Commission's Daily Calendar. PG&E states that a copy of the Advice Letter excluding the confidential appendices was mailed and distributed in accordance with Section III-G of General Order 96-A.

### **PROTESTS**

An ALJ Ruling dated September 26, 2003, addressing "Motion of PG&E for Order Shortening Time for Comment on PG&E's Motion for Adoption of Expedited Review Process," adopted an expedited schedule that requires a significantly reduced comment period on PG&E's "Motion for Adoption of Expedited Review Process for Advice Letter 2423-E." Comments on the first Motion were due September 29, with PG&E filing replies on September 30. No comments on the first Motion were filed.

On October 1, 2003, PG&E distributed to the service list in R.01-10-024 a letter from Commission's Executive Director William Ahern granting PG&E a shortened protest and reply period on AL 2423-E. Protests were due on October 6, with replies to protests due October 7.

Confidential comments were filed on October 1 by TURN. TURN requests one substantial modification to the AL filing, but generally supports the approval of these contracts. Due to the nature of TURN's request, we treat the filing as a protest.

Counsel representing the facilities (herein referred to as "Facilities") filed a confidential reply to TURN's protest on October 7. PG&E filed a confidential reply to TURN's protest on October 7. The substance of the protest and replies is discussed herein.

## **DISCUSSION**

Energy Division examines PG&E's request on multiple grounds: evaluation of the contracts, contract selection and terms of the contracts, applicability of the contracts to PG&E's RPS targets, and PRG involvement. We also consider other relevant issues such as confidentiality, schedule for review and approval, and contract reasonableness.

PG&E adheres to the requirements of the August 13 ACR. PG&E states in its filing that the contracts do not anticipate use of Supplemental Energy Payments by the CEC. PG&E also does not "seek, or need, the creation of a Market Price Referent." Since this was not a competitive solicitation, the ACR requirements on application of transmission adders and integration costs do not apply here. PG&E states that the proposed counterparties do not receive the federal Production Tax Credit (PTC). PG&E also involves its PRG in the evaluation process, as required by the ACR.

Absent established market price referents cogent to a full RPS solicitation, we find that PG&E performed due diligence in its contract evaluation and applied reasonable internal benchmarks. As stated in the filing, PG&E provided the internal benchmarks to its PRG during preliminary evaluation.

PG&E demonstrated that the recommended offers meet PG&E commercial and non-commercial provisions, and contribute toward PG&E's renewables procurement target. PG&E obtains the attributes necessary to qualify the output of the units toward its RPS targets.

### **Evaluation Methodology**

PG&E established an evaluation method to guide the selection of procurement contracts, details of which are classified as Confidential Protected Material in accordance with the May 1, 2002, Protective Order issued in Rulemaking (R.) 01-10-024, and pursuant to Pub. Util. Code Section 583. Energy Division staff and members of the PRG who have signed the non-disclosure agreement are in possession of the confidential data supporting PG&E's request.

The Market Price Referent (MPR) required by the statute and addressed in D.03-06-071 is still under development and was not available for the interim solicitations or bilateral agreements envisioned by the ACR. The ACR allows the

utility to develop its own internal benchmarks for preliminary evaluation, provided those benchmarks and details of their development are provided to the PRG. For the purpose of review and approval of PG&E's proposed contracts, Energy Division finds the benchmark(s) used were reasonable. **[[[Pricing information redacted]]]** The benchmark(s) are independent of the MPR under development for full RPS solicitations.

### **Contracts selected**

Based on the criteria explained above, PG&E selected several **[REDACTED]** renewable energy contracts. The contracts are attached as confidential Appendix A to AL 2423-E. **[REDACTED]**

**[[[Specific PPA and price information – not for disclosure]]]**

### **Application of proposed contracts toward PG&E's RPS targets**

PG&E requests that the Commission find that the contracts meet PG&E's RPS obligations, specifically that the contracts count toward PG&E's baseline quantity of eligible renewable resources pursuant to Section 399.15 of Public Utilities Code. PG&E also requests a finding that the energy count toward its Annual Procurement Target (APT).

The energy from these contracts cannot count toward both measures. At the start of the RPS program, the Commission will establish the baseline quantities of renewables for each IOU. The APT consists of the mandated one percent requirement, plus any shortfalls in baseline (such as expiry of contracts that were in the previous year's baseline). Thus, the energy can only count toward *either* the baseline quantity *or* the APT. **[REDACTED]**

These contracts will count toward PG&E's RPS target, either by making up for declines in baseline amounts (in the event the baseline-counted contracts have expired) or providing incremental generation toward the APT. The Commission has not yet completed its determination of baseline quantities for each IOU. However, Energy Division's investigation finds the facilities are providing "incremental," and not "baseline," generation. Therefore, we find that the contracts will count toward PG&E's APT.

### **Use of flexible compliance rules**

PG&E states that its execution of these contracts and filing of the Advice Letter should not be interpreted as a waiver of the “grace period” for compliance with the APT. PG&E correctly cites D.03-06-071, Ordering Paragraph 2, which states:

“Compliance with the annual procurement target is not required until a utility is creditworthy, or a creditworthiness alternative is defined in statute.”

Thus, PG&E is not required to fulfill its RPS obligations until it becomes creditworthy. However, the Commission determined in D.03-06-071 that this condition does not exempt PG&E from ultimately meeting its RPS targets. PG&E has the option to exercise the mechanisms for flexible compliance, as discussed. We also note that D.03-06-071 allows the utilities to carry over 100 percent of their APT from the first year of the program without penalty (Decision at p. 49)

### **Price refresher**

PG&E has not paid any premiums or fees to keep the selected contracts open during contract negotiation and Commission approval processes. None of the proposed contracts have “refresh” provisions that would modify the final price of the contract.

### **PRG participation**

PG&E hosted two PRG meetings on July 2 and August 14, 2003, and provided additional information about the evaluation process on September 12. PG&E also convened PRG conference calls as needed to discuss the evaluation process. The PRG had the opportunity to discuss types of products sought, evaluation method, and PG&E’s recommendations. These meetings provided the appropriate platform to keep PRG members informed on procurement developments, and to exchange concerns and ideas. It also provided means to check on the utility’s procurement planning process.

TURN, a member of the PRG, filed a protest on AL 2423-E on October 1.

### **Data filed in confidential appendices**

PG&E attached to AL 2423-E the renewable procurement contracts for which it seeks Commission approval: a briefing package provided to the ultimate decision maker(s), quantitative process used to rank offers, PRG meeting minutes and



presentation handouts, and other analyses prepared for the PRG. Inclusion of these attachments is consistent with guidance given in D. 02-08-071. Other requested documentation required by D. 02-08-071 were not relevant to this filing, such as forecast used by the utility to analyze contracts and authorized low case residual net short and amounts/percentages met with contracts. All the attachments are classified as Confidential Protected Material in accordance with the May 1, 2002, Protective Order issued in R. 01-10-024, and pursuant to Pub. Util. Code Section 583.

### **Schedule for Advice Letter review**

PG&E states in its Advice Letter filing that it is submitting contracts under the advice letter timeline specified in the August 13 ACR. PG&E is requesting an aggressively expedited schedule for review and approval of the contracts, departing significantly from the ACR provision that

“any Advice Letter submitted should follow general Commission process for Advice Letter review and should not use the expedited procedures and schedules adopted in D.02-08-071.”

While we understand the urgent nature of the filing, as described in its Confidential appendices, we strongly discourage any of the utilities from applying this kind of pressure not only to the Commission but also to parties who may wish to respond to the substantive issues. PG&E also significantly departed from the standard practice of requesting expedited review and approval of the Advice Letter within the Advice Letter itself by filing two concurrent motions in R.01-10-024 seeking the relief. Future renewables solicitations and bilateral negotiations under the RPS will follow the process outlined in D.03-06-071, which includes Commission approval of contracts by Advice Letter filing, following the normally established schedule for those filings.

### **Determination of reasonableness for purpose of rate recovery**

Appendix B of D.02-08-071 states that approval of an advice letter submitted under the transitional procurement process would constitute a determination by the Commission that costs incurred by the utility under the contract itself and/or under contracts conforming to the procurement process are “reasonable” and “prudent” for purposes of recovery in retail rates under the Pub. Util. Code for the full term of the contract(s). Energy Division believes the same finding should be made for the contracts proposed in AL 2423-E.

**[[[TURN Confidential Comments and Reply Comments of PG&E and the Facilities – contains specific PPA and price information – not for disclosure]]]**

**[REDACTED]**

It is in the public interest to disclose some aspects of the contracts, with the exception of pricing terms, and have addressed that need herein. We also draw on our rationale for disclosure in Resolution E-3816. We will disclose the number of contracts and fuel type, facility name and location, and plant size for each contract. On an ongoing basis, as we enter full implementation of the RPS, we will continue to address confidentiality issues in the RPS docket.

We find that it is in the public interest to make public certain material filed under seal pursuant to Pub. Util. Code Section 583 and General Order (G.O.) 66-C. Accordingly, text in this resolution which is marked "[REDACTED]" in the redacted copy, which contains the redacted information to be disclosed inside the brackets in the unredacted version, should be made public upon Commission approval of this resolution. Specific pricing information which appears **[[[underlined in triple brackets]]]**, which appears in this **light blue highlight** in the unredacted electronic copy, which appears in **gray highlight** in the unredacted hardcopy, should *not* be made public under any circumstances. Additionally, any terms of the Power Purchase Agreements (PPAs) and confidential information not submitted under Section 583 (i.e. TURN protest and replies of the Facilities) should not be revealed. Such information is also **highlighted in blue** or **gray** to denote its redacted nature.

### **Summary**

PG&E requests the Commission find the proposed contracts reasonable and prudent for purposes of recovery in rates without further Commission review. Energy Division finds that PG&E's use of bilateral agreements, evaluation process and contract selection comply with the August 13 ACR. PG&E also made a sufficient showing that these contracts are in the ratepayers' interest since these transactions will meet PG&E's renewable energy procurement needs at reasonable cost. The transactions may also provide some insurance against possible price hikes if adverse market conditions occur.

PG&E obtains the attributes necessary to qualify the output of the units toward its RPS targets. We find that the contracts will count toward PG&E's APT.

The Commission does not establish a routine practice or new methodology in this resolution, as the approval of these contracts is not indicative of approval of any contracts to be submitted in the future.

This resolution only applies to the interim renewable energy contracts for which PG&E is seeking Commission approval in its Advice Letter, and does not prejudge issues related to Renewables Portfolio Standard Program (RPS) implementation. Issues related to annual renewable energy procurement targets, flexible compliance mechanisms, and other details are currently being considered in R.01-10-024.

### **COMMENTS**

Public necessity requires that the 30-day comment period of Public Utilities Code section 311(g) be reduced in order to secure the benefits of the proposals contained AL 2423-E. We have balanced the public interest in avoiding the possible harm to public welfare flowing from the delay in considering this resolution against the public interest in having the full 30-day period for review and comment as required by Rule 77.7(f)(9). We conclude that the former outweighs the latter. We conclude that failure to adopt a decision before the expiration of the 30-day review and comment period would cause significant harm to the public welfare. Accordingly, we reduce the comment period for this resolution.

Comments were timely received by \_\_\_\_\_.

### **FINDINGS**

1. Assigned Commissioner Ruling dated August 13, 2003, authorized the IOUs to conduct interim renewable energy procurement, prior to full RPS solicitations, subject to specific criteria. The IOUs shall file an Advice Letter to seek pre-approval of any contract for such interim procurement.
2. The Commission required each utility to establish a Procurement Review Group (PRG) to review the utilities' interim procurement needs and strategy, proposed procurement process, and selected contracts.

3. The PRG for PG&E is comprised of Aglet Consumer Alliance, California Energy Commission (CEC), California Utility Employees (CUE), Consumers Union (CU), Department of Water Resources (DWR), Energy Division, Office of Ratepayer Advocates (ORA), Natural Resources Defense Council (NRDC), and The Utility Reform Network (TURN).
5. PG&E filed AL 2423-E on September 18, 2003, and requested expedited approval of **[REDACTED]** renewable energy contracts.
6. PG&E made a sufficient showing that the contracts were mutually agreeable to the parties, the evaluation methodology was reasonable, and the selected contracts meet PG&E's renewables procurement requirements at reasonable cost.
7. PG&E demonstrated compliance with the technical requirements of the Assigned Commissioner Ruling dated August 13, 2003. PG&E deviated from the procedural requirement of the Ruling that the IOUs must follow the general Commission process for Advice Letter review.
8. AL 2423-E was timely protested by TURN. The protest should be denied. Replies to TURN's protest were timely filed by PG&E and counsel representing the facilities named in the proposed contracts.
9. The output from these facilities under contract to PG&E will count toward PG&E's Annual Procurement Target (APT) for RPS purposes.
10. We do not establish a routine practice or new methodology in this resolution, as the approval of these contracts is not indicative of approval of any contracts to be submitted in the future.
11. We do not prejudge any issues related to Renewables Portfolio Standard Program (RPS) implementation in this resolution.
12. The confidential material being made public pursuant to this resolution was not disclosed in the redacted agenda resolution provided for public review for the Commission meeting. Text in this resolution which is marked "[REDACTED]" in the redacted copy, which contains the redacted information to be disclosed inside the brackets in the unredacted version, should be made public upon Commission approval of this resolution.

13. Specific pricing information which appears **[[[underlined in triple brackets]]]**, which appears in light blue highlight in the unredacted electronic copy, which appears in gray highlight in the unredacted hardcopy, should *not* be made public under any circumstances. Additionally, any terms of the Power Purchase Agreements (PPAs) and confidential information not submitted under Section 583 (i.e. TURN protest and replies of the Facilities) should not be revealed. Such information is also highlighted in blue or gray to denote its redacted nature.

14. We should approve AL 2423-E effective today.

**THEREFORE IT IS ORDERED THAT:**

1. PG&E's request, as filed in AL 2423-E, is approved.
2. The protest of TURN is denied.
3. All text in this resolution which is marked "[REDACTED]" in the redacted copy, and which contains the redacted information to be disclosed inside the brackets in the unredacted version, should be made public upon Commission approval of this resolution, as allowed under Public Utilities Code Section 583.
4. This resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on October 16, 2003; the following Commissioners voting favorably thereon:

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WILLIAM AHERN  
Executive Director